

No. 11641

---

United States  
Circuit Court of Appeals  
For the Ninth Circuit.

---

B. M. PHELPS and ALICE E. PHELPS,  
Appellants,  
vs.

FLOYD HANSON, EZRA HANSON, SARA  
HANSON and EVA M. HAMMOND,  
Appellees.

---

Transcript of Record

---

Upon Appeal from the District Court of the United States  
for the District of Montana

FILED

JUL 1917

PAUL P. O'BRIEN,

CLERK







No. 11641

---

United States  
Circuit Court of Appeals  
For the Ninth Circuit.

---

B. M. PHELPS and ALICE E. PHELPS,  
Appellants,  
vs.

FLOYD HANSON, EZRA HANSON, SARA  
HANSON and EVA M. HAMMOND,  
Appellees.

---

Transcript of Record

---

Upon Appeal from the District Court of the United States  
for the District of Montana



# INDEX

[Clerk's Note: When deemed likely to be of an important nature, errors or doubtful matters appearing in the original certified record are printed literally in *italic*; and, likewise, cancelled matter appearing in the original certified record is printed and cancelled herein accordingly. When possible, an omission from the text is indicated by printing in *italic* the two words between which the omission seems to occur.]

	PAGE
Amended Complaint .....	2
Exhibit A—Treaty with the Crows, 1868..	11
Appeal:	
Notice of.....	40
Points Upon Which Appellants Rely Upon Appeal and Designation of Record to be Printed on .....	48
Points Upon Which Plaintiffs Rely Upon	40
Praecipe for Designation of Portions of Record Desired on.....	42
Clerk's Certificate to Transcript of Record....	47
Decision .....	29
Defendants' Consolidated Motions to Dismiss Amended Complaint, for More Definite State- ment, etc. ....	22
Designation by Appellees of Additional Por- tions of Record, etc., to be Included in Tran- script of Record.....	45
Mailing Notice.....	44
Names and Addresses of Attorneys of Record..	1
Notice .....	38
Notice of Appeal .....	40

Order Allowing Time to File Supplemental Brief .....	28
Order Dismissing Action.....	38
Order 2/11/47.....	39
Points Upon Which Appellants Rely Upon Ap- peal and Designation of Record to be Printed on Appeal.....	48
Points Upon Which Plaintiffs Rely Upon Ap- peal .....	40
Praeipie for Designation of Portions of Record Desired on Appeal.....	42



NAMES AND ADDRESSES OF ATTORNEYS  
OF RECORD

MR. KENNETH R. L. SIMMONS,  
Billings, Montana.

MR. ROY F. ALLAN,  
Billings, Montana.

Attorneys for Appellants and Plaintiffs.

MR. H. C. CRIPPEN,  
Billings, Montana.

MR. HORACE S. DAVIS,  
Billings, Montana.

MR. ROCKWOOD BROWN,  
Billings, Montana.

MR. MARION B. PORTER,  
Billings, Montana.

MR. NORMAN HANSON,  
Billings, Montana,

Attorneys for Appellees and Defendants.

In the District Court of the United States for the  
District of Montana, Billings Division

No. 775

B. M. PHELPS and ALICE E. PHELPS,  
Plaintiffs,

vs.

FLOYD HANSON, EZRA HANSON, SARA  
HANSON and EVA M. HAMMOND,  
Defendants.

### AMENDED COMPLAINT

Come now the plaintiffs in the aove-entitled action  
and for cause of action against the defendants com-  
plain and allege:

#### I.

That the jurisdiction of this court attaches by vir-  
tue of the fact that the rights of plaintiffs claimed  
herein arise under a treaty entered into on May  
7, 1868, by and between the United States of Amer-  
ica and the Crow Tribe or Nation of Indians, which  
said treaty was ratified by the Senate of the United  
States on July 25, 1868 (15 Stat., L. 649), and pro-  
claimed August 12, 1868, by the President of the  
United States, a copy of which treaty is hereto at-  
tached, marked Exhibit "A" and made a part  
hereof. That the value of the matter in controversy  
exceeds, exclusive of costs, the sum of Three Thou-  
sand Dollars (\$3,000).

## II.

That plaintiffs are citizens and residents of the State of Montana. That the property rights of plaintiffs described herein are located wholly within the state and district of Montana. That the defendant, Eva M. Hammond, is a citizen and resident of the State of Montana. [3\*] That the defendants, Floyd Hanson, Ezra Hanson and Sara Hanson, are citizens and residents of the State of Wyoming. That the wrongful acts of the defendants, consisting of illegal diversions of the waters of the south fork of Dry Head Creek, as hereinafter alleged, occur wholly within the state and district of Montana.

## III.

That during all of the times herein mentioned, plaintiffs have been, and now are, either the equitable or legal owners and in possession of those certain parcels of land situate, lying and being within the County of Big Horn, State of Montana, and more particularly described as follows, to-wit:

The North Half of the Northwest Quarter ( $N\frac{1}{2}NW\frac{1}{4}$ ) and the Northwest Quarter of the Northeast Quarter ( $NW\frac{1}{4}NE\frac{1}{4}$ ) of Section Nine (9); the Northeast Quarter of the Northwest Quarter ( $NE\frac{1}{4}NW\frac{1}{4}$ ) and the North Half of the Northeast Quarter of Section Ten (10), formerly the Charles M. Phelps Crow Allotment No. 2170; the Northeast Quarter of the Northeast Quarter ( $NE\frac{1}{4}NE\frac{1}{4}$ ) of Section Nine (9) and the Northwest Quarter of the

---

\* Page numbering appearing at foot of page of original certified Transcript of Record

Northwest Quarter of Section Ten (10), formerly the Pearl Scott Crow Allotment No. 950; the Northwest Quarter of the Northwest Quarter of Section Eleven (11), all in Township Seven (7) South, Range Twenty-eight (28) East, M.P.M., and the appurtenances thereto.

#### IV.

That during all of the times herein mentioned, a certain creek, commonly known as the south fork of Dry Head Creek, arises in the Pryor Mountains and has its source in Township Seven (7) South, Range Twenty-eight (28) East, M.P.M., in Carbon County, Montana, and flows thence in a northerly direction approximately three miles across Townships Seven and Eight (7 & 8) South of Range Twenty-eight (28) East, M.P.M., and across the above-described lands of the plaintiffs and thence emptying into Dry Head Creek, in Big Horn County, Montana, tributary to the Big Horn River.

#### V.

That by virtue of the Treaty of May 7, 1868 (15 Stat. 649), a certain tract of land in the then Territory but now State of Montana, was set aside and reserved for the use of the Crow Indians, as a home and abiding place of said Indians. That said tract of land so set aside for the use of said Indians, except only as the exterior boundaries of said reservation were altered and the lands within the reservation diminished by further treaties between the United States and said Crow Tribe or Nation of Indians, (22 Stat. 42), (26 Stat. 1039), (33 Stat.

353, 357), has since May 7, 1868, been and now is an Indian Reservation, the home and abiding place of the said Crow Tribe or Nation of Indians, and that the exterior boundaries of said Crow Indian Reservation, since April 27, 1904, have been and now are particularly described as follows:

Beginning at the intersection of the 107th Meridian and the boundary line between Montana and Wyoming; thence due North on the 107th Meridian to a point due East of the Northeast corner of the Fort Custer Military Reservation; thence due West to the Northwest corner of the Fort Custer Military Reservation; thence due South to the Southwest corner of the Fort Custer Military Reservation; thence due West to the intersection of the line between Sections Ten and Eleven (10 & 11), Township Two (2) South, Range Twenty-eight (28) East, of the principal meridian of Montana; thence due North to the intersection of the Montana base line; thence due West to the intersection of a line running in a Southwesterly direction, following the top of the natural divide between the waters flowing into the Yellowstone and Clarks Fork Rivers upon the West and those flowing into Pryor Creek and West Pryor Creek on the East, said line extending from the Northwest corner of Section number Thirty-six (36), Township number Two (2) North, of Range Twenty-seven (27) East of the principal meridian of Montana, to the base of West Pryor Mountain; thence in a Southwesterly direction

along said line to the base of West Pryor Mountain; thence due South and up the North slope of said Pryor Mountain on a true Meridian line to a point fifteen (15) miles due North from the established line between Montana and Wyoming; thence in a due Easterly course on a parallel of latitude to a point where it [5] intersects the mid-channel of the Big Horn River; thence following up the mid-channel of said river to a point where it crosses the Montana and Wyoming State Line; thence due East along the established line between Montana and Wyoming to the point of beginning; and that all lands within such boundaries now constitute the Crow Indian Reservation and are located within the State of Montana.

## VI.

That the lands and the rights to the use of the waters of the south fork of Dry Head Creek, owned and possessed by the plaintiffs, were located within the boundaries of the Crow Indian Reservation as established by the Treaty of May 7, 1868, and are still located within the boundaries of the Crow Indian Reservation as diminished by further treaties between the United States and the Crow Tribe of Indians. That the lands of plaintiffs herein described and their rights to the use of the waters of the south fork of Dry Head Creek are located within the state and district of Montana.

## VII.

That it was the intent and purpose of the United



States of America in entering into the above-mentioned treaties, that the said Indians who had theretofore been a wandering, nomadic people, be encouraged to reside at one place and be trained to habits of industry, to till the soil, to care for their stock, and to promote their civilization, and to that end Paragraph 6 of the Treaty of May 7, 1868, was incorporated therein.

### VIII.

That by the establishment of the Crow Indian Reservation, on May 7, 1868, the United States became the trustee of the Crow Tribe of Indians, holding legal title to all of the lands and waters of the Crow Indian Reservation and at that time, on May 7, 1868, there was then reserved to said Indians and their successors in interest for irrigation and other beneficial uses upon the [6] lands of said reservation, and exempted from appropriation under territorial or state laws or otherwise, all of the waters of reservation streams necessary for the successful irrigation of irrigable lands upon said reservation, including all of the waters of the south fork of Dry Head Creek, which are necessary for the successful irrigation of plaintiffs' lands herein described.

### IX.

That since the year 1902, Charles M. Phelps, the father of plaintiff, B. M. Phelps, and the predecessors in interest of plaintiffs, have continuously diverted and put to beneficial use the waters of the south fork of Dry Head Creek for the irrigation of lands of plaintiffs hereinabove described.

## X.

That the aforesaid lands of plaintiffs are dry and arid in character and will not without artificial irrigation produce crops. That plaintiffs' predecessors in interest constructed a dam in the south fork of Dry Head Creek and an irrigation system to carry the waters of said creek to said lands. That with the assistance of artificial irrigation from the south fork of Dry Head Creek, said lands will produce and have produced crops of hay, grain, and vegetables, with the exception of the years 1944 and 1945 as herein set forth.

## XI.

That during the months of May, June, July, August, and September of each year the flow of water in the south fork of Dry Head Creek does not equal 60 miner's inches of water, during which periods of the irrigation seasons, except as hereinafter set forth, plaintiffs have used all of the waters flowing in said south fork of Dry Head Creek for the purposes of irrigating their said lands. That at no time since the year [7] 1902 has there been sufficient water in Dry Head Creek to successfully irrigate the irrigable portions of the above-described lands now owned by plaintiffs.

## XII.

That the lands of the defendants and the points of diversion of said defendants from the south fork of Dry Head Creek are all located outside of and off the Crow Indian Reservation in the State of Montana.



## XIII.

That during the irrigation seasons of 1944 and 1945, at a point or points about five or more miles south of the plaintiffs' said lands, the defendants have unlawfully and wrongfully diverted all of the waters flowing in said south fork of Dry Head Creek, to plaintiffs' damage, and that they threaten and intend to so divert all of said waters during the coming irrigation season.

## XIV.

That whatever rights, if any, said defendants have to the use of the waters of the south fork of Dry Head Creek are much later in time, subsequent and inferior to the rights of plaintiffs established and created by the Crow Treaty of May 7, 1868.

## XV.

That plaintiffs intend to irrigate approximately one hundred fifty (150) acres planted to alfalfa hay, orchard and garden on the above-described lands during the coming farming and irrigation season; that during the months of May, June, July, August, and September of this year, plaintiffs will require all of the waters flowing in the south fork of Dry Head Creek to irrigate their said crops. [8]

## XVI.

That a cloud upon plaintiffs' title or right to the use of the waters of the south fork of Dry Head Creek exists by reason of the said diversions of the defendants and each of them. That unless the defendants are restrained from diverting the waters of the south fork of Dry Head Creek as aforesaid a

cloud upon plaintiffs' title or right to the use of the waters of the south fork of Dry Head Creek will continue to exist and plaintiffs will suffer great and irreparable damage.

Wherefore, said plaintiffs pray that a preliminary injunction shall issue after due notice of this application therefor and that defendants be ordered, on a day fixed, to show cause why said preliminary injunction should not be granted, enjoining and restraining the defendants, and each of them, their servants, agents and employees from doing the acts complained of; and that upon the final determination of this suit, a permanent injunction issue, enjoining and restraining the said defendants, their agents, servants, and employees, and all persons claiming under, through, or by them, from maintaining any dams or ditches in the south fork of Dry Head Creek and from diverting by means of said dams and ditches or in any other manner any of the waters from the south fork of Dry Head Creek; that plaintiffs have and recover their costs and disbursements herein expended and that said plaintiffs have such other and further relief as shall appear to the Court meet and proper.

SIMMONS & ALLAN.

/s/ By KENNETH R. L. SIMMONS,  
Attorneys for Plaintiffs. [9]

State of Montana,  
County of Yellowstone—ss.

B. M. Phelps, being first duly sworn on his oath,

deposes and says that he is one of the plaintiffs named in the foregoing complaint; that he has read the said complaint and knows the contents thereof, and that the same is true to the best of his knowledge, information, and belief.

B. M. PHELPS.

Subscribed and sworn to before me this 9th day of February, 1946.

[Seal]                      KENNETH R. L. SIMMONS,  
Notary Public for the State of Montana, Residing  
at Billings, Montana.

My Commission expires April 19, 1947. [10]

EXHIBIT "A"

Treaty With the Crows, 1868

Articles of a treaty made and concluded at Fort Laramie, Dakota Territory, on the seventh day of May, in the year of our Lord one thousand eight hundred and sixty-eight, by and between the undersigned commissioners on the part of the United States, and the undersigned chiefs and head-men of and representing the Crow Indians, they being duly authorized to act in the premises.

Article 1. From this day forward peace between the parties to this treaty shall forever continue. The Government of the United States desires peace, and its honor is hereby pledged to keep it. The Indians desire peace, and they hereby pledge their honor to maintain it. If bad men among the whites or among other people, subject to the authority of

the United States, shall commit any wrong upon the person or property of the Indians, the United States will, upon proof made to the agent and forwarded to the Commissioner of Indian Affairs at Washington City, proceed at once to cause the offender to be arrested and punished according to the laws of the United States, and also reimburse the injured person for the loss sustained.

If bad men among the Indians shall commit a wrong or depredation upon the person or property of any one, white, black, or Indian, subject to the authority of the United States and at peace therewith, the Indians herein named solemnly agree that they will, on proof made to their agent and notice by him, deliver up the wrong-doer to the United States, to be tried and punished, according to its laws; and in case they refuse willfully so to do, the person injured shall be reimbursed for his loss from the annuities or other moneys due or to become due to them under this or other treaties made with the United States. And the President, on advising with the Commissioner of Indian Affairs, shall prescribe such rules and regulations for ascertaining damages under the provisions of this article as in his judgment may be proper. But no such damages shall be adjusted and paid until thoroughly examined and passed upon by the Commissioner of Indian Affairs, and no one sustaining loss while violating, or because of his violating, the provisions of this treaty or the laws of the United States shall be reimbursed therefor.

Article 2. The United States agrees that the following district of country, to-wit: commencing where the 107th degree of longitude west of Greenwich crosses the south boundary of Montana Territory; thence north along said 107th Meridian to the mid-channel of the Yellowstone River; thence up said mid-channel of the Yellowstone to the point where it crosses the said southern boundary of Montana, being the 45th degree of north latitude; and thence east along said parallel of latitude to the place of beginning, shall be, and the same is, set apart for the absolute and undisturbed use and occupation of the Indians herein named, and for such other friendly tribes or individual Indians as from time to time they may be willing, with the consent of the United States, to admit amongst them; and the United States now solemnly agrees that no persons, except those herein designated and authorized so to do, and except such officers, agents, and employes of the Government as may be authorized to enter upon Indian reservations in discharge of duties enjoined by law, shall ever be permitted to pass over, settle upon, or reside in the territory described in this article for the use of said Indians, and henceforth they will, and do hereby, relinquish all title, claims, or rights in and to any portion of the territory of the United States, except such as is embraced within the limits aforesaid. [11]

Article 3. The United States agrees, at its own proper expense, to construct on the south side of the Yellowstone, near Otter Creek, a warehouse or

store-room for the use of the agent in storing goods belonging to the Indians, to cost not exceeding twenty-five hundred dollars; an agency-building for the residence of the agent, to cost not exceeding three thousand dollars; a residence for the physician, to cost not more than three thousand dollars; and five other buildings, for a carpenter, farmer, blacksmith, miller, and engineer, each to cost not exceeding two thousand dollars; also a school-house or mission-building, so soon as a sufficient number of children can be induced by the agent to attend school, which shall not cost exceeding twenty-five hundred dollars.

The United States agrees further to cause to be erected on said reservation, near the other building herein authorized, a good steam circular saw-mill, with a grist-mill and shingle-machine attached, the same to cost not exceeding eight thousand dollars.

Article 4. The Indians herein named agree, when the agency-house and other buildings shall be constructed on the reservation named, they will make said reservation their permanent home, and they will make no permanent settlement elsewhere, but they shall have the right to hunt on the unoccupied lands of the United States so long as game may be found thereon, and as long as peace subsists among the whites and Indians on the borders of the hunting districts.

Article 5. The United States agrees that the agent for said Indians shall, in the future, make his home at the agency-building; that he shall reside among them, and keep an office open at all



times for the purpose of prompt and diligent inquiry into such matters of complaint, by and against the Indians, as may be presented for investigation under the provisions of their treaty stipulations, as also for the faithful discharge of other duties enjoined on him by law. In all cases of depredation on person or property, he shall cause the evidence to be taken in writing and forwarded, together with his finding, to the Commissioner of Indian Affairs, whose decision shall be binding on the parties to this treaty.

Article 6. If any individual belonging to said tribes of Indians, or legally incorporated with them, being the head of a family, shall desire to commence farming, he shall have the privilege to select, in the presence and with the assistance of the agent then in charge, a tract of land within said reservation, not exceeding three hundred and twenty acres in extent, which tract, when so selected, certified, and recorded in the "land book," as herein directed, shall cease to be held in common, but the same may be occupied and held in the exclusive possession of the person selecting it, and of his family, so long as he or they may continue to cultivate it.

Any person over eighteen years of age, not being the head of a family, may in like manner select and cause to be certified to him or her, for the purposes of cultivation, a quantity of land not exceeding eighty acres in extent, and thereupon be entitled to the exclusive possession of the same as above directed.

For each tract of land so selected a certificate, containing a description thereof and the name of the person selecting it, with a certificate endorsed thereon that the same has been recorded, shall be delivered to the party entitled to it by the agent, after the same shall have been recorded by him in a book to be kept in his office, subject to inspection, which said book shall be known as the "Crow land book."

The President may at any time order a survey of the reservation, and when so surveyed, Congress shall provide for [12] protecting the rights of settlers in their improvements, and may fix the character of the title held by each. The United States may pass such laws on the subject of alienation and descent of property as between Indians, and on all subjects connected with the government of the Indians on said reservations and the internal police thereof, as may be thought proper.

Article 7. In order to insure the civilization of the tribe entering into this treaty, the necessity of education is admitted, especially by such of them as are, or may be, settled on said agricultural reservation; and they therefore pledge themselves to compel their children, male and female, between the ages of six and sixteen years, to attend school; and it is hereby made the duty of the agent for said Indians to see that this stipulation is strictly complied with; and the United States agrees that for every thirty children, between said ages, who can be induced or compelled to attend school, a house shall



be provided, and a teacher, competent to teach the elementary branches of an English education, shall be furnished, who will reside among said Indians, and faithfully discharge his or her duties as a teacher. The provisions of this article to continue for twenty years.

Article 8. When the head of a family or lodge shall have selected lands and received his certificate as above directed, and the agent shall be satisfied that he intends in good faith to commence cultivating the soil for a living, he shall be entitled to receive seed and agricultural implements for the first year in value one hundred dollars, and for each succeeding year he shall continue to farm, for a period of three years more, he shall be entitled to receive seed and implements as aforesaid in value twenty-five dollars per annum.

And it is further stipulated that such persons as commence farming shall receive instructions from the farmer herein provided for, and whenever more than one hundred persons shall enter upon the cultivation of the soil, a second blacksmith shall be provided, with such iron, steel, and other material as may be required.

Article 9. In lieu of all sums of money or other annuities provided to be paid to the Indians herein named, under any and all treaties heretofore made with them, the United States agrees to deliver at the agency house, on the reservation herein provided for, on the first day of September of each year for thirty years, the following articles, to-wit:

For each male person, over fourteen years of age, a suit of good substantial woolen clothing, consisting of coat, hat, pantaloons, flannel shirt, and a pair of woolen socks.

For each female, over twelve years of age, a flannel skirt, or the goods necessary to make it, a pair of woolen hose, twelve yards of calico, and twelve yards of cotton domestics.

For the boys and girls under the ages named, such flannel and cotton goods as may be needed to make each a suit as aforesaid, together with a pair of woolen hose for each.

And in order that the Commissioner of Indian Affairs may be able to estimate properly for the articles herein named, it shall be the duty of the agent, each year, to forward to him a full and exact census of the Indians, on which the estimate from year to year can be based.

And, in addition to the clothing herein named, the sum of ten dollars shall be annually appropriated for each Indian [13] roaming, and twenty dollars for each Indian engaged in agriculture, for a period of ten years, to be used by the Secretary of the Interior in the purchase of such articles as, from time to time, the condition and necessities of the Indians may indicate to be proper. And if, at any time within the ten years, it shall appear that the amount of money needed for clothing, under this article, can be appropriated to better uses for the tribe herein named, Congress may, by law, change the appropriation to other purposes; but in no event shall the amount of this appropriation be withdrawn

or discontinued for the period named. And the President shall annually detail an officer of the Army to be present and attest the delivery of all goods herein named to the Indians, and he shall inspect and report on the quantity and quality of the goods and the manner of their delivery; and it is expressly stipulated that each Indian over the age of four years, who shall have removed to and settled permanently upon said reservation, and complied with the stipulations of this treaty, shall be entitled to receive from the United States, for the period of four years after he shall have settled upon said reservation, one pound of meat and one pound of flour per day, provided the Indians cannot furnish their own subsistence at an earlier date. And it is further stipulated that the United States will furnish and deliver to each lodge of Indians, or family of persons legally incorporated with them, who shall remove to the reservation herein described, and commence farming, one good American cow and one good, well-broken pair of American oxen, within sixty days after such lodge or family shall have so settled upon said reservation.

Article 10. The United States hereby agrees to furnish annually to the Indians the physician, teachers, carpenter, miller, engineer, farmer, and blacksmiths as herein contemplated, and that such appropriations shall be made from time to time, on the estimates of the Secretary of the Interior, as will be sufficient to employ such persons.

Article 11. No treaty for the cession of any por-

tion of the reservation herein described, which may be held in common, shall be of any force or validity as against the said Indians unless executed and signed by, at least, a majority of all the adult male Indians occupying or interested in the same, and no cession by the tribe shall be understood or construed in such a manner as to deprive, without his consent, any individual member of the tribe of his right to any tract of land selected by him as provided in Article 6 of this treaty.

Article 12. It is agreed that the sum of five hundred dollars annually, for three years from the date when they commence to cultivate a farm, shall be expended in presents to the ten persons of said tribe who, in the judgment of the agent, may grow the most valuable crops for the respective year.

W. T. SHERMAN,  
Lieutenant-General.

WM. S. HARNEY,  
Brevet-Major-General and  
Peace Commissioner.

ALFRED H. TERRY,  
Brevet Major-General.

C. C. AUGUR,  
Brevet Major-General.

JOHN B. SANBORN,  
S. F. TAPPAN.

ASHTON S. H. WHITE,  
Secretary.

- [Seal] CHE-RA-PEE-ISH-KA-TW,  
Pretty Bull, his x mark.
- [Seal] CHAT-STA-HE,  
Wolf Bow, his x mark.
- [Seal] AH-BE-CHE-SE,  
Mountain Tail, his x mark.
- [Seal] KAM-NE-BUT-SA,  
Black Foot, his x mark.
- [Seal] DE-SAL-ZE-CHO-SE,  
White Horse, his x mark.
- [Seal] CHIN-KA-SHE-ARACHE,  
Poor Elk, his x mark.
- [Seal] E-S-WOOR,  
Shot in the Jaw, his x mark.
- [Seal] E-SHA-CHOSE,  
White Forehead, his x mark.
- [Seal] —ROO-KA,  
Pounded Meat, his x mark.
- [Seal] DE-KA-KE-UP-SE,  
Bird in the Neck, his x mark.
- [Seal] ME-NA-CHE,  
The Swan, his x mark.

Attest:

GEORGE B. WILLIS,  
Phonographer.  
JOHN D. HOWLAND,  
ALEX GARDNER,  
DAVID KNOX,  
CHAS. FREEMAN,  
JAS. C. O'CONNOR.

[Endorsed]: Filed Feb. 27, 1946. [15]

[Title of District Court and Cause.]

DEFENDANTS' CONSOLIDATED MOTIONS  
TO DISMISS AMENDED COMPLAINT,  
FOR MORE DEFINITE STATEMENT,  
ETC.

The defendants separately and without waiver by any one motion herein made of any other such motion now respectfully move the court pursuant to Rule 15 (a) and Rule 12 (a), (b), (e) and (g), Federal Rules of Civil Procedure, as follows:

I.

To dismiss the plaintiffs' amended complaint and action for the reason that the said amended complaint fails to state a claim upon which relief can be granted.

II.

To dismiss the plaintiffs' amended complaint and action for the reason that it appears from the face of the amended complaint the court has no jurisdiction over the subject matter of the action.

III.

To dismiss the plaintiffs' amended complaint and action for the reason that the court is without jurisdiction, because the matter in controversy does not arise under (a) the Constitution of the United States, or (b) the laws of the United States, or (c) a treaty made under their authority. [17]

IV.

To dismiss the plaintiffs' amended complaint and action for the reason that the court is without juris-



diction, because the matter in controversy does not exceed \$3,000.00, exclusive of interest and costs, as an inspection of the allegations of the amended complaint shows, and more particularly as appears otherwise in that

(a) The plaintiffs cannot recover herein any amount in excess of \$3,000.00, exclusive of interest and costs, nor any other amount at all; and

(b) The value of the right to the use of the waters, during the annual irrigation seasons, of the south fork of Dry Head Creek, delivered upon the plaintiffs' lands and into their ditch or ditches, without interference by the defendants, which is the matter in controversy herein, does not exceed the sum of \$3,000.00, exclusive of interest and costs, but is to the contrary of a value not greater than \$50.00, or thereabouts; and

(c) The value of the plaintiffs' right to the use, during the months of May, June, July, August and September of each year, of the water in the south fork of Dry Head Creek, delivered upon the plaintiffs' lands and into their ditch or ditches, without interference, diversion or prior use by the defendants, which as the plaintiffs allege does not equal 60 miner's inches of water, and which is the matter in controversy herein, does not exceed the sum of \$3,000.00, exclusive of interest and costs, but is to the contrary of a value not greater than \$500.00, or thereabouts; and

(d) The value of the plaintiffs' right to the use of the waters in the south fork of Dry Head Creek during the annual irrigation seasons, as claimed by

them in their complaint, without interference by the defendants, is because [18] of the nature of the flow of the south fork aforesaid, of the creek bed, and of other attendant physical factors in nowise lessened or diminished by the use of the plaintiffs and their diversion of the waters in the south fork aforesaid as heretofore has long been customary and usual. Accordingly the matter in controversy is of inconsequential value, does not exceed the sum of \$3,000.00, exclusive of interest and costs, and is to the contrary of a value not greater than \$500.00, or thereabouts; and

(e) The use and the diversion by the defendants of the waters of the south fork of Dry Head Creek, as has heretofore been usual and customary during the annual irrigation seasons, and as is alleged in the plaintiffs' amended complaint, does not appreciably diminish any right of the plaintiffs to the use of the flow of water in the south fork of Dry Head Creek at any time during the annual irrigation seasons aforesaid or otherwise. Accordingly, the diminution in value of the plaintiffs' rights as they claim because of any use or prior diversion by the plaintiffs does not exceed the sum of \$3,000.00, exclusive of interest and costs, and is to the contrary not more than \$500.00, or thereabouts, and

(f) The plaintiffs have not heretofore lost, and will not hereafter lose, any sum, whatsoever, or be prejudiced in any sum of money or amount at all because of the use or diversion of any waters of the south fork of Dry Head Creek by the defendants at any time.



## IV.

To dismiss the plaintiffs' amended complaint and action for the reason that it appears from the face of the amended complaint this action is not prosecuted [19] in the name of the real party in interest, viz., the United States of America, the trustee holding the legal title to the lands and waters in the amended complaint mentioned, which are involved in this action as more particularly alleged in paragraph VIII of the amended complaint.

## V.

To dismiss the plaintiffs' amended complaint and action for the reason that it appears from the face of the amended complaint the United States of America is a necessary and indispensable party plaintiff in the premises to bring and maintain any action on the part of the plaintiffs, or either of them.

(a) Because any rights of the plaintiffs in the premises under the treaty of May 7, 1868, to which the amended complaint particularly refers, are held and owned by the United States of America, because of the reservation made to it under the treaty aforesaid as the trustee of the Crow Tribe or Nation of Indians, and

(b) Because its legal title aforesaid the United States has not transferred to the plaintiffs, or either of them, but now appears from the amended complaint yet to own and hold in trust for the plaintiffs as its beneficiaries; and

(c) Because notwithstanding these facts the

United States has not consented to sue or to be sued in this action, and may not without its consent be here sued or impleaded.

## VI.

Or, in the alternative, to direct the plaintiffs to file a more definite statement or a bill of particulars of the following matters, to which the amended complaint herein refers, to-wit: [20]

1. The date and the manner of the appropriation made by Charles M. Phelps, as in paragraph IX of the amended complaint averred, of the waters of the South Fork of Dry Head Creek.

2. The quantity of water originally appropriated by Charles M. Phelps and the lands upon which the waters so appropriated were originally used for irrigation or other beneficial uses, as alleged in paragraph IX of the amended complaint.

3. The size and location of the ditch, ditches, or other irrigation works, by which Charles M. Phelps diverted water for irrigation and other beneficial uses, as alleged in paragraph IX of the amended complaint.

4. The manner of the plaintiffs' succession to, and ownership of, any appropriation made by Charles M. Phelps of the waters of the South Fork of Dry Head Creek, as alleged particularly in paragraph IX of the amended complaint, and whether the plaintiffs' ownership as so alleged is (a) by a legal title, or (b) by an equitable title.

5. The area of the lands of the plaintiffs originally irrigated by Charles M. Phelps by his initial appropriation of the waters of the South Fork of

Dry Head Creek, as in paragraph IX of the amended complaint alleged.

6. The date of the construction of the dam in the South Fork of Dry Head Creek and of the irrigation system, to which reference is made in paragraph X of the amended complaint.

7. The location and the area of (a) the irrigable portions of the plaintiffs' lands, and (b) of their lands actually heretofore irrigated with the waters of the South Fork of Dry Head Creek, as alleged in paragraph XI of the amended complaint.

8. The date and the priority claimed by the plaintiffs in the use of the waters of the South Fork of Dry Head Creek, to which particular reference is made in paragraph XIV of the amended complaint.

These Motions are one and all made upon the plaintiffs' amended complaint herein, including as a part thereof the exhibit thereunto annexed, marked "Exhibit A," and thereof made a part, and upon all the files, minute entries, papers and proceedings herein.

Dated at Billings, Montana, this 29th day of May, 1946.

H. C. CRIPPEN,

Attorney for Defendants.

ROCKWOOD BROWN &

HORACE S. DAVIS,

FRANKLIN S. LONGAN.

By HORACE S. DAVIS,

Attorneys for Defendants.

Personal service of the within and foregoing Defendants' Consolidated Motions to Dismiss Amended Complaint, for more Definite Statement, etc., made and admitted, and the receipt of a copy thereof acknowledged this 29th day of May, 1946.

SIMMONS & ALLAN,  
By ROY F. ALLAN,  
Attorneys for Plaintiff.

[Endorsed]: Filed May 30, 1946. [22]

---

[Title of District Court and Cause.]

ORDER ALLOWING TIME TO FILE  
SUPPLEMENTAL BRIEF

This cause was duly called for hearing this day on the consolidated motions to dismiss the amended complaint, said motions having been filed on May 30, 1946, Mr. Kenneth R. L. Simmons being present and appearing for the plaintiffs, and Mr. Horace S. Davis being present and appearing for the defendants.

Thereupon Court ordered said motions submitted on plaintiff's brief heretofore filed, counsel for plaintiff stating that the legal questions in the motions are covered in said brief, and further ordered that defendants be and are granted ten days to file a supplemental brief if so advised, the said defendants having heretofore filed a brief, but which brief may not cover the questions raised in the new motions, the said above-mentioned briefs having been

filed on the consolidated motions directed to the original complaint herein.

Entered in open Court at Billings, Montana, October 28, 1946.

H. H. WALKER,  
Clerk. [24]

---

In the District Court of the United States, in and  
for the District of Montana, Billings Division

Civil Action No. 775

B. M. PHELPS and ALICE E. PHELPS,  
Plaintiffs,

vs.

FLOYD HANSON, EZRA HANSON, SARA  
HANSON and EVA M. HAMMOND,  
Defendants.

### DECISION

The above-entitled action is before the court at this time on defendants' consolidated motions to dismiss amended complaint, for more definite statement, etc.

This is an action to quiet title to prior rights claimed by plaintiffs to the waters of the south fork of Dry Head Creek; that the lands and water rights owned and possessed by plaintiffs are located within the Crow Indian Reservation in the state and district of Montana, and plaintiffs herein seek injunctive and other relief.

The complaint was filed February 27th, 1946, thereafter defendants filed their consolidated motions to dismiss, for more definite statement, etc., followed by their brief, and a reply brief was filed by plaintiffs on May 9th, 1946. Before these briefs were considered by the court, plaintiffs, on May 22nd, 1946, amended their complaint. Counsel for defendants thereafter filed their consolidated motions to dismiss the amended complaint, for more definite statement, etc., and both sides were granted time to revise their briefs. On November 7th, 1946, counsel for defendants submitted their revised brief, and counsel for plaintiffs announced that they would stand on their original brief of May 9th, 1946. Thereafter the motions and briefs were referred to the court for consideration and decision. [26]

The court has devoted considerable time to the complaint and many of the decisions cited in both briefs and has found it very difficult to determine how the present action can be maintained in the federal court. An effort has been made to find jurisdictional grounds in the Powers case (16 Fed. (2) 155) and in the Winters case (207 U.S. 564), in which the United States was plaintiff in both cases, but has been unable to do so in view of the pertinent and apparently controlling decisions that appear to be more directly in point. If the court should accept the reasoning of the plaintiffs and attempt to force a trial on the merits, it seems certain that it would result in an expenditure of time and effort to no purpose, and that the objections in-



terposed to the complaint in the final outcome would have to be sustained.

From a perusal of the decisions in point, it does not appear that this action can be based upon the Crow Treaty of 1868, or that there are any other laws or treaties of the United States to support jurisdiction in the federal court, nor can it be predicated upon the constitutional provisions cited. The courts uniformly hold that a mere assertion of ownership of lands and water rights by a title derived from the United States, or under any law or treaty thereof, is not of itself sufficient to confer jurisdiction in federal courts. In this case for jurisdictional authority the plaintiffs refer back to the treaty of 1868, wherein it is alleged there was reserved to said Indians and their successors in interest for irrigation and other beneficial uses upon the reservation lands, and which were therein exempted from appropriation under territorial or state laws or otherwise, all the waters of reservation streams, which would include the waters of the south fork of Dry Head Creek for the irrigation of plaintiffs' lands. Counsel for [27] defendants admit that the foregoing allegations are the closest to a jurisdictional averment contained in the complaint, but deny its sufficiency to confer jurisdiction.

One of the latest cases having some bearing on the issue of jurisdiction in this case is found in the opinion of Mr. Justice Black in *Bell v. Hood*, 327 U.S. 678, with a dissenting opinion by Mr. Chief Justice Stone and Mr. Justice Burton. The facts in this case are entirely different from the instant

case. In the Bell case suit was brought against the defendants, Agents of the Federal Bureau of Investigation, for violations of the Fourth and Fifth Amendments to the Constitution, wherein it was alleged that they conducted an illegal search and seizure of the plaintiffs' premises and property, and damages in excess of the sum of \$3000 were alleged: plaintiffs allege imprisonment by defendants (in violation of their Constitutional rights) and subjecting their premises to search and their possessions to seizure, in violation of their Constitutional right to be free from unreasonable searches and seizures; the defendants moved to dismiss the complaint for failure to state a cause of action for which relief could be granted and for summary judgment on the grounds that the federal agents acted within the scope of their authority as officers of the United States, and that the searches and seizures were incidental to lawful arrests and therefore valid.

A hearing on the motions took place, supported by affidavits and counter affidavits. The District Judge did not decide the motions, but on his own motion dismissed the case for want of federal jurisdiction, stating the action was not one that " \* \* \* arises under the Constitution or laws of the United States \* \* \* ." as required by 28 U.S.C.A., Sec. 41 (1), which was later affirmed by the Circuit Court of Appeals of the Ninth Circuit on the same grounds (150 F. (2) 96). At the same time a motion was made for a direction to the district [28] court to allow plaintiffs to amend the complaint to make it still more clearly appear that the action was



directly grounded on violations of rights alleged to stem from the Fourth and Fifth Amendments.

The court held that it was the pleaders' purpose to make violation of the above Constitutional provisions the basis of the suit; that the complaint is so drawn as to seek recovery directly under the Constitution or laws of the United States. The Court here cites *Wiley v. Sinkler*, 179 U.S. 58, 64, 65, and *Swafford v. Templeton*, 185 U.S. 487, 491, 492; in the first case cited the action was brought against election officers for damages and for the rejection of an elector's vote for a member of the House of Representatives to the United States, which was at a federal election, showing that the action was brought directly under the Constitution and laws of the United States; the principal facts in the second case are almost identical with the first case, and the court there held it to be the duty of the court to determine "whether in truth and in fact a real federal question arises on the record"; here the decision plainly shows that "the very subject matter of the controversy is Federal." And so there is presented here in the Bell case a late precedent where the very subject matter of the controversy is held to be federal, and that jurisdictional requirements have been fully satisfied, although the dissenting opinion holds directly to the contrary. But it does not appear that the facts in the three cases above set forth bear more than a slight resemblance to the facts in the present case.

Plaintiffs claim title to the lands in question and a superior right to the use of water for irrigation;

whether the title was based upon an ancient treaty of the United States with the Indians or upon a straight patent earned [29] by compliance with other laws of the United States would not of itself seem to confer jurisdiction on the United States courts to settle a dispute over a water right, if, the Bell case, *supra*, is compared with other authorities where the facts are more closely in point. Other pertinent authorities show that the mere assertion of ownership of lands and water rights under a title from the United States, either law or treaty, does not of itself confer jurisdiction on the United States District Court either under Article Three, Section II of the Constitution or Section 41, Title 28, U.S. C.A. It must appear that the action arises under, and that its determination will necessarily involve and require the construction of the laws of the United States specifically relied upon. Is there anything in the amended complaint to enable the court to say that the allegations show that the construction of a treaty or statute is necessary? It has been held that before the court can retain a cause under its jurisdiction it must appear from the record by a clear statement of facts set forth in legal and logical form that the suit is one which really and substantially involves a dispute or controversy which depends upon the construction or effect of the Constitution or some law or treaty of the United States.

In one case cited, that of *Deere v. St. Lawrence, etc., Co.*, (C.C.A. 2) 32 F (2d) 550, cited by counsel for both parties the following would apply here: "But it is asserted by appellant that his right is

founded upon the treaties of 1784 and 1796, which gave him a present right of possession. This claim denotes that the source of appellant's title is in the treaties of the United States, and such an allegation does not establish the claim that the suit arises under the laws of the United States, so as to confer original jurisdiction. In *Blackburn v. Portland*, \* \* \* it was held, where a controversy arose in respect to lands, and where one of the parties derived title upon an Act of Congress, that [30] of itself did not present a federal question. In *Florida Cent. R.R. v. Bell*, \* \* \* which was an action for ejectment, the plaintiff's claim was under the patent granted by the United States and in proceedings in the Land Department; the defendants contended that the plaintiffs were not entitled to a patent under the laws of the United States, and the defendant claimed the right under an act of Congress to erect its railroad upon the patented land. Jurisdiction was denied by the court in holding that mere assertion of title to land derived to the plaintiffs under and by virtue of a patent granted by the United States presented no question which of itself conferred jurisdiction under the Circuit Court of the United States. \* \* \*''

It appears from statements made by plaintiffs in their brief that they claimed to hold fee title to the lands and waters involved and that the United States has no present interest in the waters of Dry Head Creek and that no rights of the United States or of any trust lands and waters are involved in this controversy. The rule established in the case of *Gustason v. California Trust Co.*, (C.C.A. 9), 73 F. (2d)

765, would seem to be precisely in point in the case under consideration, and especially in that part of the decision quoting from *Wilson v. Robinson* (C.C.A. 9), 16 F. (2d) 431, where the rule is set forth in precise terms.

The sufficiency of the allegation in respect to the amount in controversy is also challenged by counsel for the defendants who say that the unsupported statement that the matter in controversy is of value exceeding \$3000 is wholly insufficient under such circumstances and that where objections are properly raised as to the amount the plaintiffs are required to support the allegation by competent proof. Where the challenge is by motion which traverses the truth of the allegations as to amount and recited facts dehors the complaint it would then be necessary to inquire as to [31] the court's jurisdiction before considering the merits of the case, and it is shown that upon such inquiry being made the complainant has the burden of proof. That in the case cited the respondent having failed to support the allegations as to amount in controversy the district court should have dismissed the bill. This seems to be the gist of the decision in respect to amount in controversy in *KVOS, Inc., v. Associated Press*, 299 U.S. 269, 81 L.Ed. 183, 57 S. Ct. Rep. 197. And the court also held that such a mere formal allegation is sufficient, unless the bill contains others which qualify or detract from it in such measure that when all are considered together it cannot fairly be said that jurisdiction appears on the face of the complaint. Mr.

Chief Justice Hughes held in *McNutt v. General Motors Corp.*, 298 U.S. 178, among other pertinent things, that "If this allegations of jurisdictional facts are challenged by his adversary in any appropriate manner, he must support them by competent proof." In that case an injunction was sought upon the ground that the matter in controversy arose under the Constitution of the United States but it did not appear that the value involved exceeded \$3000, exclusive of interest and costs. In other words, when the value of the matter in controversy, exclusive of interest and costs, is challenged, it must be affirmatively shown to exceed \$3000. This has not been done in this case as appears conclusively from the authorities relied upon.

The court has considered many cases cited by counsel on both sides in connection with the allegations of the amended complaint, and the arguments of counsel, and is now of the opinion that the United States District Court is without jurisdiction to hear and determine the issues involved, as set forth in the amended complaint in this action, and, accordingly, the motion to dismiss is hereby sustained.

Feb. 8, 1947.

CHARLES N. PRAY,  
Judge.

[Endorsed]: Filed Feb. 8, 1947. [32]

[Title of District Court and Cause.]

### ORDER DISMISSING ACTION

The defendants' consolidated motions to dismiss the amended complaint of the plaintiffs, for a more definite statement, etc., having been previously argued by the counsel upon written briefs; and the motion of the defendants having been by the court heretofore, to-wit, on February 8, 1947, sustained; and good cause therefore being made to appear,

Now, Therefore, the amended complaint of the plaintiffs herein and their cause of action is, and they are each and both hereby dismissed.

Done and dated this 11th day of February, 1947.

By the Court:

CHARLES N. PRAY,  
Judge.

[Endorsed]: Filed and Entered Feb. 11, 1947.

---

[Title of District Court and Cause.]

### NOTICE

To: B. M. Phelps and Alice E. Phelps, plaintiffs herein, and to Simmons & Allan, Esqs., their attorneys:

You, and each of you, will take notice hereby that heretofore, to-wit, on February 11, 1947, the court by its order of date that day regularly dismissed the above-entitled action and the complaint of the plaintiffs therein as more certainly appears from the



copy of such order hereunto annexed and hereby served upon you.

You, and each of you, will take notice accordingly.

Dated this 17th day of February, 1947.

H. C. CRIPPEN,  
ROCKWOOD BROWN &  
HORACE S. DAVIS,  
By HORACE S. DAVIS,  
Attorneys for Defendants.

[Endorsed]: Filed Feb. 18, 1947.

---

[Title of District Court and Cause.]

### ORDER

The defendants' consolidated motions to dismiss the amended complaint of the plaintiffs, for a more definite statement, etc., having been previously argued by the counsel upon written briefs; and the motion of the defendants having been by the court heretofore, to-wit: on February 8, 1947, sustained; and good cause therefore being made to appear,

Now, Therefore, the amended complaint of the plaintiffs herein and their cause of action is, and they are each and both hereby dismissed.

Done and dated this 11th day of February, 1947.

By the Court:

CHARLES N. PRAY,  
Judge.

Filed and Entered Feb. 11, 1947.



Personal service of the within and foregoing Notice made and admitted, and the receipt of a duplicate original thereof, together with a copy of the said order, acknowledged this 17th day of February, 1947.

SIMMONS & ALLAN,  
By KENNETH R. L. SIMMONS,  
Attorneys for Plaintiffs.

[Endorsed]: Filed Feb. 18, 1947. [37]

---

[Title of District Court and Cause.]

#### NOTICE OF APPEAL

Notice Is Hereby Given, that B. M. Phelps and Alice E. Phelps, plaintiffs above named, do hereby appeal to the Circuit Court of Appeals for the Ninth Circuit from the order made by the court and so entered herein on the 11th day of February, 1947, and the whole thereof, dismissing the amended complaint of plaintiffs herein and their cause of action.

SIMMONS & ALLAN,  
By KENNETH R. L. SIMMONS,  
Attorneys for Plaintiffs.

[Endorsed]: Filed May 6, 1947. [39]

---

[Title of District Court and Cause.]

#### POINTS UPON WHICH PLAINTIFFS RELY UPON APPEAL

The plaintiffs above named, and each of them, having heretofore given notice of their appeal from

the order made and entered by the Court herein on the 11th day of February, 1947, now specify points upon which they rely upon this appeal:

I.

The trial court erred in dismissing the amended complaint of plaintiffs herein and their cause of action.

II.

The trial court erred in not overruling the defendants' consolidated motions to dismiss amended complaint for more definite statement, etc., filed in said action.

Dated this 7th day of May, 1947.

SIMMONS & ALLAN,

By KENNETH R. L. SIMMONS,

Attorneys for Plaintiffs. [41]

Personal service of the within and foregoing points upon which plaintiffs rely upon appeal made and admitted and the receipt of a true copy thereof acknowledged this 7th day of May, 1947.

H. C. CRIPPEN,

ROCKWOOD BROWN &

HORACE S. DAVIS,

By HORACE S. DAVIS,

Attorneys for Defendants.

[Endorsed]: Filed May 8, 1947. [42]

[Title of District Court and Cause.]

PRAECIPE FOR DESIGNATION OF PORTIONS OF RECORD DESIRED ON APPEAL

To: The Clerk of the District Court of the United States in and for the District of Montana:

Please Prepare a transcript of the record for the purpose of the appeal of plaintiffs to the United States Circuit Court of Appeals for the Ninth Circuit from the order made and entered in the above entitled cause on the 11th day of February, 1947, dismissing the amended complaint of the plaintiffs therein and their cause of action, and include therein the following:

1. The complaint of plaintiffs as amended by order of this Court of May 22, 1946.

2. Defendants' consolidated motions to dismiss amended complaint, for more definite statement, etc.

3. Decision of the Court, filed February 8, 1947.

4. Final order of the Court dismissing amended complaint of the plaintiffs and their cause of action, filed and entered February 11, 1947. [44]

5. Notice directed to plaintiffs and their attorneys, dated February 17, 1947, by attorneys for defendants of order entered by the court dismissing the amended complaint of the plaintiffs and their cause of action.

6. This praecipe for designation of portions of record on appeal with acknowledgment of service thereon.

Said transcript is to be prepared and fully certified by you as required by law and the rules of the above-entitled court and the rules of the United States Circuit Court of Appeals for the Ninth Circuit. You should state in such certificate that there has been deposited with you as clerk of the above-entitled court a cash cost bond on appeal in the amount of Two Hundred Fifty Dollars (\$250.00).

It is the desire of the plaintiffs or appellants that the Clerk of the Circuit Court of Appeals for the Ninth Circuit have printed the entire transcript of the record and so certified by you.

Dated this 7th day of May, 1947.

SIMMONS & ALLAN,  
By KENNETH R. L. SIMMONS,  
Attorneys for Plaintiffs.

Personal service of the within and foregoing praecipe made and admitted and the receipt of a true copy thereof acknowledged this 7th day of May, 1947.

H. C. CRIPPEN,  
ROCKWOOD BROWN &  
HORACE S. DAVIS,  
By HORACE S. DAVIS,  
Attorneys for Defendants.

[Endorsed]: Filed May 8, 1947. [45]

[Title of District Court and Cause.]

### MAILING NOTICE

Mailed copy Notice of Appeal to H. C. Crippen, Billings, Montana, and to Messrs. Rockwood Brown and Horace S. Davis and Franklin S. Longan, at Billings, Montana, Attorneys for Defendants.

May 10, 1947. [47]

---

Thereafter, on May 10, 1947, the plaintiffs and appellants herein posted a Cash Cost Bond on Appeal herein, in the sum of Two Hundred Fifty Dollars, (\$250.00), and said sum, as such Cash Cost Bond on Appeal, was deposited in the Registry of this Court pending the outcome of the appeal herein, and is now on deposit in the Registry of this Court.

[Title of District Court and Cause.]

DESIGNATION BY APPELLEES OF ADDITIONAL PORTIONS OF RECORD, ETC., TO BE INCLUDED IN TRANSCRIPT OF RECORD

To: The Clerk of the District Court of the United States in and for the District of Montana:

Pursuant to Rule 75(a), Federal Rules of Civil Procedure, the appellants and defendants in this cause hereby designate the following additional portions of the record, proceedings, and evidence to be included in the transcript of the record on the appeal of the appellants and plaintiffs aforesaid to the Circuit Court of Appeals of the United States for the Ninth Circuit from the order of this court made on February 11, 1947, dismissing the plaintiffs' and appellants' amended complaint and their cause of action herein, to-wit:

1. The proceedings had in open court at Billings, Montana, on or about October 28, 1946, upon the submission of the defendants' consolidated motions to dismiss amended complaint, for more definite statement, etc., as such proceedings appear upon the minutes of the court and from the official court reporter's notes.

2. This designation by the defendants and appellees of the proceedings aforesaid to be included in the transcript of the record on appeal.

Dated this 14th day of May, 1947. [50]

H. C. CRIPPEN,  
415 Electric Building,  
Billings, Montana.

Attorney for Defendants and  
Appellees.

HORACE S. DAVIS,  
Suite 4, The Montana Nat. Bk.  
Bldg., Billings, Montana.  
Attorney for Defendants and  
Appellees.

ROCKWOOD BROWN &  
HORACE S. DAVIS,  
MARION B. PORTER and  
NORMAN HANSON,  
By HORACE S. DAVIS,  
Suite 4, The Montana Nat. Bk.  
Bldg., Billings, Montana.  
Attorneys for Defendants and  
Appellees.

Personal service of the within and foregoing Designation by Appellees of Additional Portions of Record, Etc., to be included in Transcript of Record made and admitted, and the receipt of a copy thereof acknowledged, this 14th day of May, 1947.

SIMMONS & ALLAN,  
By KENNETH R. L. SIMMONS,  
Attorneys for Plaintiffs and  
Appellants.

[Endorsed]: Filed May 15, 1947.



In the District Court of the United States in and  
for the District of Montana, Billings Division

CLERK'S CERTIFICATE TO TRANSCRIPT  
OF RECORD

United States of America,  
District of Montana—ss.

I, H. H. Walker, Clerk of the United States District Court for the District of Montana, do hereby certify and return to the Honorable, The United States Circuit Court of Appeals for the Ninth Circuit, that the foregoing volume consisting of pages, numbered consecutively from 1 to 52, inclusive, constitutes a full, true and correct transcript of all portions of the record in case number 775, B. M. Phelps and Alice E. Phelps vs. Floyd Hanson, Ezra Hanson, Sara Hanson and Eva M. Hammond, designated by the parties as the record on appeal therein, as appears from the original records and files of said court in my custody as such Clerk.

I further certify that the costs of said transcript amount to the sum of Ten and 20/100ths Dollars, and have been paid by the appellant.

Witness my hand and the seal of said court at Great Falls, Montana, this 27th day of May, A. D., 1947.

[Seal]

H. H. WALKER,  
Clerk.

By /s/ C. G. KEGEL,  
Deputy.

[Endorsed]: No. 11641. United States Circuit Court of Appeals for the Ninth Circuit. B. M. Phelps and Alice E. Phelps, Appellants, vs. Floyd Hanson, Ezra Hanson, Sara Hanson and Eva M. Hammond, Appellees. Transcript of Record. Upon Appeal from the District Court of the United States for the District of Montana.

Filed June 2, 1947.

/s/ PAUL P. O'BRIEN,

Clerk of the United States Circuit Court of Appeals  
for the Ninth Circuit.

---

United States Circuit Court of Appeals for the  
Ninth Circuit

No. 11641

B. M. PHELPS and ALICE E. PHELPS,  
Appellants,  
vs.

FLOYD HANSON, EZRA HANSON, SARA  
HANSON and EVA M. HAMMOND,  
Appellees.

POINTS UPON WHICH APPELLANTS RELY  
UPON APPEAL AND DESIGNATION OF  
RECORD TO BE PRINTED ON APPEAL

In behalf of their appeal from the order made  
and entered in the United States District Court for

the District of Montana on February 11, 1947, and the whole thereof, dismissing the amended complaint of plaintiffs therein and their cause of action, appellants hereby formally adopt the statement of points relied upon appeal filed in the United States District Court for consideration by the United States Circuit Court of Appeals for the Ninth Circuit. In behalf of said appeal the appellants, and each of them, further rely upon and hereby designate the entire transcript of record to be printed under Sub-division 6 of Rule 19 (C.C.A. 9), as was transmitted by the Clerk of the United States District Court for the District of Montana, to this court on the 29th day of May, 1947.

SIMMONS & ALLAN,  
/s/ By KENNETH R. L. SIMMONS,  
Attorneys for Appellants.

Personal service of the within and foregoing points upon which appellants rely upon appeal and designation of record to be printed on appeal made and the receipt of a true copy thereof acknowledged this 2nd day of June, 1947.

H. C. CRIPPEN,  
ROCKWOOD BROWN &  
HORACE S. DAVIS,  
/s/ By HORACE S. DAVIS,  
Attorneys for Appellees.

[Endorsed]: Filed June 5, 1947.

